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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 197

GEORGE F. VASEN, *Petitioner*

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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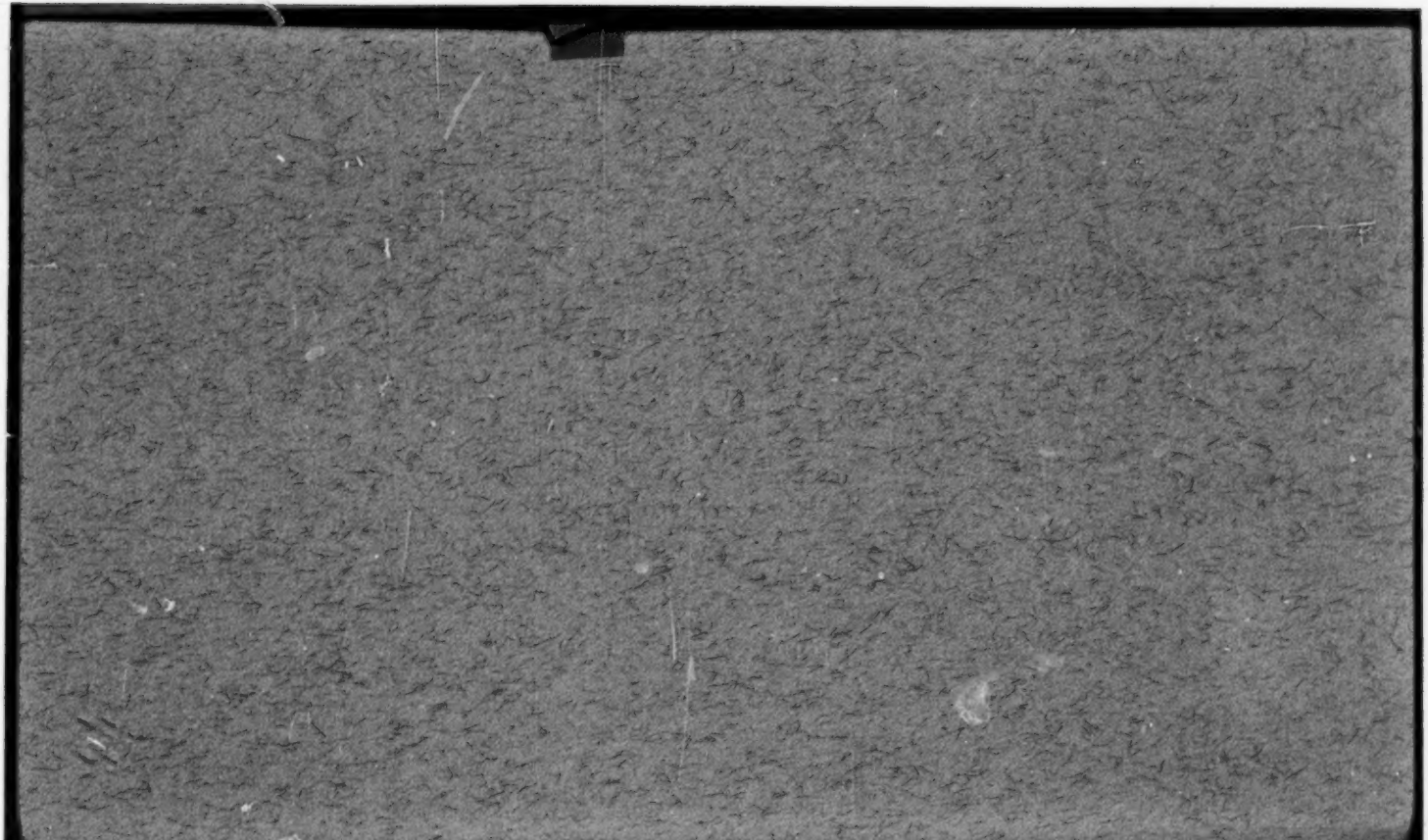

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, George F. Vasen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case, affirming the judgment of the District Court of the Northern District of Illinois, Eastern Division, No. 11,209.

OPINIONS BELOW

There was no opinion in the District Court. There were two opinions in the Court of Appeals; the majority opinion being delivered by Circuit Judges Major and Lindley and the minority opinion being delivered by Circuit Judge Finnegan. These opinions are not yet reported and are set forth in the Appendix at pages 1a to 14a.

JURISDICTION

The Court of Appeals filed and entered its judgment affirming the judgment of the District Court on April 15, 1955, denied the Petition for Rehearing on June 3, 1955, and stayed its mandate on June 8, 1955 for a period of thirty (30) days pending the filing of this application for a writ of certiorari.

The jurisdiction of this Court is invoked under section 1254 (1), Title 28 U. S. Code.

The jurisdiction of this Court is invoked to review the decision of the Court of Appeals affirming the judgment of the District Court on the following grounds:

The decision of the Court of Appeals sustains the conviction of the petitioner in a criminal prosecution wherein the District Court denied the petitioner a fair trial by an impartial jury and the effective assistance of counsel for his defense in violation of his rights under the Sixth Amendment to the Constitution of the United States.

The decision so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The decision embodies important questions of federal law which have not been, but should be settled by this Court.

The decision is in conflict with the decisions of other Courts of Appeals on the same matters in: *Braswell* v. *United States,* 5th Cir. 1952, 200 F. 2d 597, 602; *Billeci* v. *United States,* DC Cir. 1950, 87 App. D. C. 274, 184 F. 2d 394, 24 ALR 881; *Coplon* v. *United States, DC Cir.* 1951, 89 App. D. C. 103, 114, 191 F. 2d 749, certiorari denied 342 U. S. 926; and *Butzman et al.* v. *United States,* 6th Cir. 1953, 205 F. 2d 343, 351, certiorari denied 346 U. S. 828.

The decision is in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

1. Where the trial Judge addressed the jury at the beginning of petitioner's trial in the District Court about a wholly unrelated and notorious criminal case which had just previously been tried in the same Court, commenting upon the evidence therein and giving a summation of his judicial reaction to the previous jury's verdict of not guilty, and where the remarks clearly implied that criticism reflecting upon their honesty, integrity and intelligence as jurors awaited the members of any jury whose decision failed to agree with the views of the presiding Judge, did the remarks of the trial Judge deny the petitioner a fair trial by an impartial jury in violation of his rights under the Sixth Amendment to the Constitution of the United States?

2. Did the Court of Appeals err in holding that the remarks of the trial Judge did not constitute plain error adversely affecting a substantial right of the

petitioner and in sustaining the conviction of the petitioner?

3. Where the issues, whether the District Court denied the petitioner his right under the Sixth Amendment to the Constitution of the United States to have the effective assistance of counsel for his defense and whether this right was intelligently and voluntarily waived, were raised for the first time on an incomplete record in the Court of Appeals, did the Court of Appeals err in denying petitioner's request to suspend its ruling on the appeal for a reasonable time to afford petitioner an opportunity to present these issues to the trial Court and to bring the matter back to the Court of Appeals for a final ruling?

CONSTITUTIONAL PROVISIONS

Amendment VI of the Constitution of the United States, 1 Stat. 97, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

The pertinent parts of section 1341, Title 18, U. S. Code; section 77 q (a), Title 15, U. S. Code; section 77 e (a), Title 15, U. S. Code and section 2255, Title 28, U. S. Code, are set forth in the Appendix to this Petition at pages 15a to 17a.

STATEMENT

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner on an indictment in which five counts charged the use of the mails pursuant to a scheme to defraud in violation of section 1341, Title 18, U. S. Code; three counts charged the use of the mails to sell securities pursuant to a scheme to defraud in violation of section 77 q (a), Title 15, U. S. Code; and one count charged the sale of an unregistered security by use of the mails in violation of section 77 e (a), Title 15, U. S. Code.

After the jurors had been sworn in the District Court, to try the issues of the petitioner's guilt or innocence of the foregoing charges and before they had received any evidence, the District Judge addressed the jury as follows:

> THE COURT: Now, Ladies and Gentlemen, we will have the opening statement by the Government. It just happens that counsel for the defendant has a severe condition of laryngitis, and I will not impose upon him to give his opening statement this afternoon. We will then adjourn until one o'clock Monday when we will resume and have his statement and proceed with the case, putting on evidence.
>
> I apologize for the delay today, but since you were here I tried a number of cases; one of them we just finished today, involving a complicated matter. It just happened it ran over and I couldn't help it.
>
> I think in fairness to this defendant I should say something to you Ladies and Gentlemen before this case starts. I do not want you people to get the impression that I as a judge have any notion about what you should do as members of the

jury, and I am going to try to give this defendant a fair trial and give the Government a fair trial.

I have been practicing law and been a judge altogether over a period of upwards of twenty-seven years; about twenty-five of that was as a lawyer. I have disagreed with a few juries, and not too much. I never criticized but one jury in my life, as a practicing lawyer or as a judge. Most of the decisions that I have seen since I have been a judge were just about the same as I would have rendered. I did criticize one, and some of you may know about it, and I do not regret that I did. If I had it to do over I would again, because in that particular case we had a man who sat here on the witness stand who was charged with robbery and admitted when he took the stand—he did not have to take the stand, but he took the stand and admitted himself that he had been convicted of larceny, and then he admitted that he had pleaded guilty to robbery before, and the jury saw four deputies necessary, sitting around him during the whole time.

When the evidence began to get pretty conclusive about the man at the bank who went to the back door and looked out and saw a car bearing license that was the same number as was on this man's car, the same description of the car, and a man who resembled this man, was blond and gave a description, but too far away to identify him—when it began to get too warm he talked to his attorney and the attorney gets up and says: 'Now, we'll admit that the car in which the robbery was done belonged to us, that it belonged to my client, that he had it in his possession immediately before the robbery, about thirty minutes, and that he had it in his possession immediately after the robbery. The only thing of it is my client went over to get a haircut while it happened.'

And then the testimony further showed that he left a place way up on the north side at three-thirty, on Bosworth Avenue, 1300 something, he took his sister-in-law to his mother's—mind you, leaving at three-thirty—took his sister-in-law to her mother's at her address; then he took his sister-in-law's brother-in-law to this place where the haircut was to take place; then he took the car over to another place, turned it over to one of the two fellows who had testified that they were with him and held up the bank and used the guns, and that the car and the guns were furnished by him, and who were not in any way impeached—two much younger fellows—all of that—and the robbery was done and completed and the police were there at five minutes after four, in a period of thirty-five minutes that he accomplished all of those many things.

It sounded to me like you would have had to have Alladin's magic carpet to have moved around over the city of Chicago, because that was out on Harrison Street, around Harrison Street and Crawford, and then still the car had to get over to Cicero where the robbery occurred. It was so impossible and improbable.

But I think in fairness to any defendant that I want you to know that I haven't got any preconceived notions. But in a case like that, a man that confesses that he was guilty of robbery but he just didn't do this one, and with such a flimsy excuse.

I make that statement because I want this defendant, and I want the Government both to have a fair trial, and I do not want you to have any idea that I participate in or have any notions or am in the habit of criticizing juries about their decisions.

Counsel for the Government will proceed.

The United States Attorney on pages 26 and 27 of the Government's brief in the Court of Appeals brings into clearer focus the circumstances which prompted the trial Judge to make these remarks, as follows:

> * * * The case at bar had been called for trial and a jury was selected by January 5, 1954. Due to witness difficulties, the case was continued after the jury was sworn to try the issues. Previously, in December, 1953 the trial court undertook the trial of one Alphonse Bartkus, who was charged with bank robbery. In spite of rather conclusive testimony as to the guilt of Bartkus the jury found him not guilty on December 18, 195[3]. [Records of the United States District Court: United States v. Vasen, 53 Cr. 361, United States v. Bartkus, et al., 53 Cr. 537.] Whereupon the trial court, exercising a general duty to interest himself in the fair and impartial administration of justice, saw fit to comment in no uncertain terms on the whimsical, capricious or possibly the corrupt verdict of the jury. Who can deny the responsibility of the trial court in such a matter?
>
> The attendant publicity was what is commonly referred to as front-page news, and it lasted for several days. However, within a month after the articles relating to the Judge's comments appeared in the Chicago area newspapers, the trial of the case at bar was commenced.

In referring to the remarks of the trial Judge the Court of Appeals, in the majority opinion below, stated:

> * * * Evidently the judge had been dissatisfied with an apparent miscarriage of justice in a previous case, where the jury had ignored the evidence and acquitted a defendant who, the judge undoubtedly thought, was guilty. Rather wide publicity had been given the incident by the press.

Thereafter the trial proceeded with the introduction of evidence, consisting of the testimony of numerous witnesses and more than two hundred documentary exhibits, and continued intermittently from the 15th day of January to the 3rd day of March, 1954 when the jury returned a verdict finding the petitioner guilty as charged in the indictment and the trial Judge sentenced the petitioner upon certain counts of the indictment to five years in the custody of the Attorney General, to pay fines totalling twenty-five thousand dollars ($25,000.00), and ordered the petitioner placed on probation for a period of five years, following his release from custody, upon other counts.

The petitioner did not testify in his own behalf.

In the Petition for Rehearing in the Court of Appeals petitioner contended for the first time that the District Court had denied the petitioner his right under the Sixth Amendment to the Constitution of the United States to have the effective assistance of counsel for his defense and that he had not intelligently and voluntarily waived this right. On this issue the record is incomplete in that it contains a part but not all of the facts and circumstances which the petitioner contends will substantiate these contentions.

In these circumstances the petitioner requested the Court of Appeals, on the authority of *Butzman et al.* v. *United States,* 6th Cir. 1953, 205 F. 2d 343, 351, certiorari denied 346 U. S. 828, that final judgment on the appeal be suspended for a reasonable period of time, during which the petitioner might present this issue to the trial Court and following which the matter might again be brought to the Court of Appeals for a final ruling.

The petitioner asserted in the Court of Appeals and now asserts in this Court, that if given the opportunity prior to the final judgment herein, he would present to the trial Court, in support of his contentions, the following facts and circumstances:

On October 22, 1953 when the case was first called on the trial calendar, Assistant United States Attorney Calihan announced to the trial Court that he and Assistant United States Attorney Ward would try the case, that it would take from twenty to twenty-five trial days, that the Government was not ready for trial, and that they ought to have a month to get ready.

Assistant United States Attorney Ward was seriously ill during the months of December 1953 and January 1954.

On January 4, 1954 when the case was next called on the trial calendar, Assistant United States Attorney Calihan announced to the trial Court that it was the intention that Assistant United States Attorney Ward would try the case and that he (Calihan) would assist him, that Mr. Ward had been ill and the Government was not ready for trial, that he (Calihan) could get the case ready, that Mr. Ward may not be back for a month, and that he (Calihan) would try the case.

On October 22, 1953 and January 4, 1954 Attorney Swalwell appeared as counsel for the petitioner and announced to the trial Court that he was appearing only as a friend of the petitioner until the petitioner could obtain other counsel for his defense, that he did not intend to act as counsel for the petitioner in the trial of the case, that he had been ill, and that he had made no preparation for the trial.

Prior to January 4, 1954 Assistant United States Attorney Calihan informed Attorney Swalwell that because of Assistant United States Attorney Ward's illness the Government would not be ready for trial. Based upon this information the petitioner understood that the trial would not begin on January 4, 1954 but would be passed to a later date when Mr. Ward was well enough to participate.

On January 4, 1954, when it appeared that the trial Court intended to force the Government and the petitioner to proceed with an immediate trial of the case, Attorney Swalwell repeatedly protested and earnestly requested a continuance so that he might interview and subpoena witnesses and make preparation for the trial, and again advised the trial Court that he had expected other counsel in the case, that he had made no preparation, and that he was not ready for trial.

Whereupon the trial Court refused to grant the request of Attorney Swalwell for a continuance and ordered an immediate trial of the case which was held on January 4, 5, 6, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, February 15, 16, 17, 18, 19, 23, 24, 25, 26 and March 1 and 2, 1954.

Prior to the commencement of the trial on January 4, 1954 the petitioner, realizing the seriousness of the charges contained in the lengthy indictment against him and the complexities of the case with witnesses and business records in the State of Mississippi and elsewhere beyond the jurisdiction of the trial Court, diligently sought to employ counsel for his defense within ample time for adequate preparation for the trial, but petitioner was not financially able to do so.

The petitioner did not know that he had a Constitutional right to the assistance of counsel for his defense, did not know that the trial Court would appoint counsel for his defense, and for this reason did not request the trial Court to appoint counsel for his defense within ample time for adequate preparation of the trial.

The trial Court did not advise the petitioner of the existence and nature of his right to the assistance of counsel for his defense. Moreover, the trial Court made no inquiry of the petitioner with respect to his efforts to employ counsel, with respect to his financial ability or inability to employ counsel, or with respect to his desire to have and his need for the effective assistance of counsel for his defense.

In these circumstances Attorney Swalwell agreed, notwithstanding his lack of preparation and state of ill-health, to act as counsel for the petitioner throughout the trial of the case. However, the facts are that Attorney Swalwell was then suffering ill-health with a serious heart disease which had existed for some time prior to this trial and was not physically able to render to the petitioner the effective assistance of counsel to which the petitioner was entitled. Thus on January 25, 1954 during the progress of the trial Attorney Swalwell became completely incapacitated because of his heart condition, was physically unable to proceed with the trial until the next day, and thereafter only to a limited extent.

Whereupon, on January 26, 1954 the trial Court, acting on his own motion solely because of the obvious ill-health and doubtful physical ability of Attorney Swalwell to continue alone as counsel for the peti-

tioner, appointed Attorney Burns to act with Attorney Swalwell as co-counsel for the petitioner. Attorney Burns had made no preparation for the trial of the case and had no opportunity or reason to be interested in the case until his appointment by the Court. Thereafter the record shows that Attorneys Swalwell and Burns appeared as counsel for the petitioner until the conclusion of the trial.

ARGUMENT

I

The remarks of the trial Judge to the jury denied the petitioner a fair trial by an impartial jury in violation of his rights under the Sixth Amendment to the Constitution of the United States.

The remarks of the trial Judge had no place in the petitioner's trial. They concerned a wholly unrelated criminal case which had received considerable notorious publicity. The case had just previously been tried in the same District Court by the same trial Judge. The jurors had returned a verdict of not guilty and the trial Judge had severely censured and criticized their action. Wide publicity had been given the incident by the press.

At the beginning of petitioner's trial, the trial Judge obviously realized that his public criticism of the action of the prior jurors was improper and reflected upon their honesty, integrity, and intelligence as jurors. It appears that the trial Judge, with the best of intentions, thought it necessary to explain his criticism of the prior jury to the present jurors because some of them might know of the incident and might be improperly influenced, through fear of similar criticism,

to return a verdict of guilty in the petitioner's case. But the trial Judge, despite his good intentions, instead of explaining his criticism, undertook to justify it by detailing the evidence which he believed conclusively established the defendant's guilt and by referring to the previous convictions of the defendant and to the defendant's testimony which he considered "a flimsy excuse" and "impossible and improbable". Moreover, to make the matter worse, the trial Judge told the present jurors that he did not regret his criticism of the prior jurors and that if he had it to do over he would criticize them again.

The trial Judge may have been "inspired by anxiety to assure [petitioner] a fair trial", as stated in the majority opinion below, but his "injudicious" and "indiscreet" remarks overstepped the boundaries of the proprieties in a jury trial far too far to be corrected later by an instruction or additional comment that his criticism of the prior jury's verdict was not justified and that there would be no criticism of the present jurors if they saw fit to return a verdict of not guilty in petitioner's case.

Circuit Judge Finnegan, in the dissenting opinion below, stated:

> Because these remarks created an unfit intellectual climate for adjudicating guilt or innocence I would reverse defendant's conviction and judgment entered thereon. That pre-trial summation of judicial reaction to a previous jury's verdict carries clear intimation and forebodings of potential criticism awaiting any jury whose decision failed to square with views harbored by the presiding judge. His remarks infected the trial environment by engendering fear in the jurors' minds, of criticism. Once these are implanted it

is psychologically futile to attempt eradication by instructions or, even worse, for a reviewing tribunal to recline on the nearest convenient assumption that fundamental rights flourished unimpaired. Intimidation by fear of non-compliance and consequent loss of judicial approbation impaired impartiality.

If I accepted the government's gloss it would simply mean turning my back on practicality and reality while gliding to an affirmance on the notion that those prefatory words were either dissipated by lapse of time or merely constituted an admonition concerning jury duty. Indeed, the impact of the District Judge's words are stressed in this fashion by the government, in its brief:

> Whereupon the trial court, exercising a general duty to interest himself in the fair and impartial administration of justice, *saw fit to comment in no uncertain terms* on the whimsical, capricious or possibly the corrupt verdict of the jury. Who can deny the responsibility of the trial court in such a matter? (Italics supplied)

Responsibility for fair and impartial administration of justice rests upon the trial judge, but this is hardly accomplished by charging the atmosphere of a trial with "comments in no uncertain terms" about past verdicts. I think it time some breadth of vision be achieved in criminal cases.

* * *

* * * It cannot be logically said in one case jury instructions cure alleged errors and then here say the jury paid scant attention, or construed the quoted passage in non-prejudicial terms. I prefer to err, if indeed I do on the side of one accused of crime. See e.g. Bollenbach v. United States, 326 U. S. 607 (1946); United States v. Levi, (7th Cir. 1949) 177 F. 2d 833. Defendants are unclassified when measuring rights accorded them, or to which

they are entitled, during criminal trials. Before the bar, a man is neither tax-evader, murderer, nor petty thief prior to conviction by an impartial tribunal. Trite, distasteful and inconvenient as these elementary principles may appear, persons accused of crime remain entitled to a fair and impartial trial.

Mr. Chief Justice Hughes, delivering the majority opinion, in United States v. Wood, 299 U. S. 123, 145-146 (1936) wrote this trenchant observation which well illustrates my point of concern:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

Petitioner contends that the remarks of the trial Judge constitute a plain error adversely affecting a substantial right of petitioner, that is the right to a fair trial by an impartial jury, which may be noticed by this Court under Rule 52 (b), Federal Rules of Criminal Procedure, notwithstanding the failure of petitioner to bring the error to the attention of the District Court.

As in *Byars* v. *United States,* 1927, 273 U. S. 28, 32, this Court stated:

> * * * the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In *United States* v. *Atkinson,* 1936, 297 U. S. 157, 160, the Court stated:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

In *Brasfield* v. *United States,* 1926, 272 U. S. 448, this Court considered an alleged error arising from the trial Judge inquiring of the jury, after some hours of deliberation, how it was divided numerically and was informed by the foreman that it stood nine to three without indicating which number favored a conviction. This alleged error, by comparison, was certainly not as prejudicial to the defendant as was the comment of the trial Judge to the jury in the present case. Yet the Court in dealing with the question at page 450, stated:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. . . . It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. Cf. Wiborg v. United States, 163 U. S. 632, 658, et seq., 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 220, et seq.,

49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429; Crawford v. United States, 212 U. S. 183, 194, 53 L. ed. 465, 470, 29 Sup. Ct. Rep. 260; Weems v. United States, 217 U. S. 349, 362, 54 L. ed. 793, 796, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705. This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done.

In *Glasser* v. *United States,* 1942, 315 U. S. 60, 82, the Court stated:

> The judge conducting a jury trial in a federal court is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." Quercia v. United States, 289 U. S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding.

In *Quercia* v. *United States,* 1933, 289 U. S. 466, 470, 471, the Court stated:

> This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. * * * He may not charge the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered." United States v. Breitling, 20 How. 252, 254, 255, 15 L. ed. 900, 902. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. Hicks v. United States, 150 U. S. 442, 452, 37 L. ed. 1137, 1141, 14 S. Ct. 144; Allison v. United States, 160 U. S. 203, 207, 209, 210, 40 L. ed. 395, 397, 398, 16 S. Ct. 252. * * * "It was for the jury to test the credibility of the

defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law." Allison v. United States, 160 U. S. 203, 40 L. ed. 395, 16 S. Ct. 252, supra.

And in *Bollenbach* v. *United States,* 1946, 326 U. S. 607, 612, 614, 615 this Court stated:

> * * * "The influence of the trial judge on the jury is necessarily and properly of great weight," Starr v. United States, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.
>
> * * *
>
> * * * In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those "technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded. [February 26, 1919] 40 Stat. 1181, c. 48, 28 USCA § 391, 8 FCA title 28, § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The "technical

errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale LJ 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. Bruno v. United States, 308 U. S. 287, 293, 294, 84 L. ed. 257, 260, 261, 60 S. Ct. 198; Weiler v. United States, 323 U. S. 606, 611, 89 L. ed. 495, 499, 65 S. Ct. 548, 156 ALR 496. From presuming too often all errors to be "prejudicial", the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

The majority opinion delivered in the Court of Appeals upon the rendering of the judgment sought to be reviewed is clearly at variance and in conflict with the foregoing opinions of this Court, and likewise is in conflict with the decisions of the Court of Appeals of the Fifth Circuit in *Braswell* v. *United States,* 5th Cir. 1952, 200 F. 2d 597, 602 and the Court of Appeals of the District of Columbia Circuit in *Billici* v. *United States,* DC Cir. 1950, 87 App. D. C. 274, 184 F. 2d 394, 24 ALR 881.

In the *Braswell case* the Court of Appeals for the Fifth Circuit, dealt with an alleged error based upon

remarks of the trial Judge to the jury to which the defendants did not specifically object, and stated:

> The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. See United States v. Haupt, 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.
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> While counsel for the defendants did not specifically object to the comments of the court on the trial, we think that they affected substantial rights of the defendants and that it is the responsibility of this court to notice them. Rule 52 (b), Federal Rules of Criminal Procedure; United States v. Ward, 3 Cir., 168 F. 2d 226, 228; Robertson v. United States, 84 U. S. App. D. C. 185, 171 F. 2d 345, 346. We think that none of these appellants have had that fair and impartial trial which is their constitutional right, and the judgment is therefore reversed.

In the *Billici case,* the Court of Appeals for the District of Columbia Circuit restated the rules governing the functions and proper relation of the trial Judge to a jury in the trial of a criminal case. Petitioner contends that the remarks of the trial Judge to the jury in the present case clearly violate these rules and deny the petitioner a fair trial by an impartial jury in violation of his rights under the Sixth Amendment to the Constitution of the United States.

It is therefore submitted that the Court of Appeals erred in holding that the remarks of the trial Judge did not constitute plain error adversely affecting a

substantial right of the petitioner and in sustaining the conviction of the petitioner.

II

The Court of Appeals erred in denying petitioner's request to suspend its ruling on the appeal for a reasonable time to afford petitioner an opportunity to present the issues, whether the District Court denied the petitioner his right under the Sixth Amendment to the Constitution of the United States to have the effective assistance of counsel for his defense and whether this right was intelligently and voluntarily waived, to the trial Court and to bring the matter back to the Court of Appeals for a final ruling.

The decision of the Court of Appeals is at variance and in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Butzman et al.* v. *United States,* 6 Cir. 1953, 205 F. 2d 343, 351, certiorari denied 346 U. S. 828.

In the *Butzman case,* the defendants were prosecuted jointly—Butzman for falsely and fraudulently executing a document required by the Internal Revenue Laws and Craig for aiding and advising in the preparation of such document. The United States District Court for the Northern District of Ohio, Eastern Division, rendered judgments of conviction and the defendants appealed. The Court of Appeals for the Sixth Circuit held in substance that the evidence justified the finding of guilt against Butzman, but that Craig would be given an opportunity to present to the trial Court the issue raised for the first time in the Court of Appeals as to whether he had been deprived of his right to the effective assistance of counsel and whether he had intelligently and voluntarily waived this right.

In this case Craig contended for the first time in the Court of Appeals that the Attorney representing both Butzman and Craig had a conflict of interest which deprived Craig of the effective assistance of counsel to which he was entitled.

As to this issue the Court of Appeals for the Sixth Circuit stated:

> * * * Such a conflict of interest deprives an accused of the effective "assistance of counsel" as defined by Supreme Court decisions. Glasser v. United States, 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680; United States v. Hayman, 342 U. S. 205, 208, 72 S. Ct. 236, 96 L. Ed. 232. See also Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158. This right is too fundamental to permit a Court to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser v. United States, supra, 315 U. S. at page 76, 62 S. Ct. 457, 86 L. ed. 680.
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> It is well settled that the right to the assistance of counsel can be waived. Johnson v. Zerbst, 304 U. S. 458, 469, 58 S. Ct. 1019, 82 L. ed. 1416; United States v. Hayman, supra, 342 U. S. at pp. 208-209, 72 S. Ct. 236, 96 L. ed. 232. However, every reasonable presumption will be indulged against the waiver of such a fundamental right, Glasser v. United States, supra, 315 U. S. at page 70, 62 S. Ct. 457, 86 L. ed. 680, and the Court should "not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, supra, 304 U. S. at page 464, 58 S. Ct. at page 1023, 82 L. ed. 1461. The Supreme Court also said in Johnson v. Zerbst, supra, 304 U. S. at page 464, 465, 58 S. Ct. at page 1023, that an intelligent waiver of the right to counsel depends upon the particular facts and circumstances in each case, and, "whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and

appropriate for that determination to appear upon the record."

Representation by a particular attorney may be under such circumstances as not to meet the constitutional requirement. Glasser v. United States, supra; United States v. Hayman, supra. This issue was not raised in the trial court, and the present record does not show under what circumstances Craig consented to the dual representation. Apparently Craig's present contention is that he did not intelligently and voluntarily waive his right of representation by separate counsel of his own choosing. The Government's contention that such contentions can not be substantiated does not deny appellant the opportunity of supporting them by evidence. Walker v. Johnston, 312 U. S. 275, 287, 61 S. Ct. 574, 85 L. ed. 830. The issue is one which should properly be presented to the trial court instead of being raised for the first time in this Court on an incomplete record. Sec. 2255, Title 28 U. S. Code, provides for such a hearing. United States v. Hayman, supra. The ruling on the appeal of Craig will be suspended for a reasonable period of time, during which the appellant may present this issue to the trial court, if he so desires, following which the matter may be again brought to us for a final ruling.

The right to assistance of counsel means not only the right to employ counsel and to be represented by counsel employed, but it may also mean the right to have counsel appointed or assigned by the Court where the accused is unable to employ counsel. In Federal Courts, the Sixth Amendment to the Constitution of the United States providing inter alia that "in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense," has been construed as granting to an accused unable

to procure the services of an attorney the right to have the Court appoint competent and qualified counsel to assist him.

A defendant's "failure to request counsel does not constitute a waiver when the defendant does not know of his right to counsel." *Gibbs* v. *Burke,* 1949, 337 U. S. 773, 780, 93 L. ed. 1686, 1691, 69 S. Ct. 1247.

In *Johnson* v. *Zerbst,* 1938, 304 U. S. 458, 464, 465, 82 L. ed. 1461, 58 S. Ct. 1019, this Court stated:

> The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

The decision of the Court of Appeals is also at variance and in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Coplon* v. *United States,* D. C. Cir. 1951, 89 U. S. App. D. C. 103, 114, 191 F. 2d 749, certiorari denied, 342 U. S. 926, wherein the Court of Appeals stated:

> The Supreme Court said in Glasser v. United States, 1942, 315 U. S. 60, 76, 62 S. Ct. 457, 467, 86 L. ed. 680: " * * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
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> We think it is further true that the right to have the assistance of counsel is so fundamental and

absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial. In the Glasser case, having held that the trial court "denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment", the Supreme Court said: "This error requires that the verdict be set aside and a new trial ordered as to Glasser."

* * *

A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty.

Based upon the foregoing and the transcript herein the judgment of the trial Court should have been reversed by the Court of Appeals for the Seventh Circuit.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated at Washington, D. C. this 1st day of July, 1955.

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